



Leslie Tchaikovsky

LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Debtor-in-Possession.

Debtors-in-Possession.

VS.

Defendants.

AND RELATED ADVERSARY PROCEEDINGS

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**MEMORANDUM OF DECISION RE MOTION FOR
POST-PETITION ATTORNEYS' FEES**

Defendant Burlingame Capital Partners II, L.P. ("Burlingame") seeks an award of post-petition attorneys' fees pursuant to its various contracts with the above-captioned debtors as part of its undersecured claim against Qmect, Inc. ("Qmect") and its general, unsecured claim against Fred and Linda Koelling (the "Koellings")(referred to hereinafter collectively as its "unsecured claim"). For the reasons stated below, the Court concludes that Burlingame is entitled to include its reasonable post-petition attorneys' fees in its unsecured claim against these debtors. A determination of a specific amount of those fees must await the submission of a more detailed description of the work done litigating issues peculiar to bankruptcy law.

A. PROCEDURAL BACKGROUND

On or about August 29, 2006, Burlingame sought an award of post-petition attorneys' fees and costs as part of its judgment in the above-captioned consolidated adversary proceedings. After the motion was fully briefed and a hearing conducted, the Court took the motion under submission. On October 16, 2006, the Court issued its decision denying the motion without prejudice.

In its decision, the Court observed that, at that time, the controlling law in the Ninth Circuit was represented by In re Fobian, 951 F.2d 1149 (9th Cir. 1991). The Fobian court held that attorneys' fees were not recoverable for litigating issues peculiar to bankruptcy law. Fobian, 951 F.2d at 1153. The Court observed that

1 the motion was insufficiently specific to permit the Court to
2 determine what portion of the fees were requested for litigating
3 issues peculiar to bankruptcy law. It also observed that the issue
4 presented in Fobian was currently before the United States Supreme
5 Court in Travelers Casualty & Surety Co. v. Pacific Gas & Electric
6 Co., 167 Fed.Appx. 593 (9th Cir.)(unpublished), cert. granted, 127
7 S.Ct. 377 (2006). The Court directed Burlingame to resubmit its
8 motion after segregating the time spent on bankruptcy issues from
9 that spent on nonbankruptcy issues.

10 On February 8, 2007, Burlingame filed an amended motion for
11 attorneys' fees, complying with this instruction. The motion was
12 heard on March 8, 2007 and was again taken under submission. On
13 March 20, 2007, the Supreme Court issued its decision in Travelers
14 Casualty & Surety Co. of America v. Pacific Gas & Electric Co., 127
15 S.Ct. 1199 (2007). The Travelers court expressly overruled Fobian.
16 It noted that the only reason given by the lower courts for
17 disallowing the fees was that the work performed related to issues
18 peculiar to bankruptcy law. The Supreme Court found that there was
19 no basis in the Bankruptcy Code for barring post-petition attorneys'
20 fees on this ground.¹ Travelers, 127 S.Ct. at 1205. However, it
21 declined to rule on the debtor's contention that no post-petition
22 fees could be included in an unsecured creditor's claim because the
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26 ¹None of the fees in Travelers were requested for work
performed litigating issues of state law. See Travelers, 127 S.Ct.
at 1202-03.

1 debtor had failed to make this argument to the lower courts or in
2 opposition to the creditor's petition for certiorari.

3 On April 3, 2007, Burlingame filed a supplemental brief asking
4 whether the Court wished further briefing on the effect of Travelers
5 on its motion for post-petition fees. On April 6, 2007, the Court
6 issued an order setting a briefing schedule and indicating that no
7 hearing would be scheduled unless the Court concluded, after reading
8 the papers, that a hearing was necessary. The Court has concluded
9 that no hearing is required.

10 **B. DISCUSSION**

11 **1. Introduction**

12 Burlingame contends that existing Ninth Circuit law, other than
13 Fobian, recognizes an unsecured creditor's right to include post-
14 petition attorneys' fees in its unsecured claim to the extent they
15 are provided for by contract or nonbankruptcy statute. It further
16 notes that all of the other Circuits that have addressed this issue
17 have reached the same conclusion. It argues that the various
18 provisions of the Bankruptcy Code compel this conclusion. It notes
19 that 11 U.S.C. § 502(b) provides that a creditor's claim shall be
20 allowed unless one of nine enumerated exceptions applies. None of
21 the nine enumerated exceptions refers to post-petition attorneys'
22 fees.

23 In response, the Koellings rely on the theory advanced by the
24 debtor in Travelers, which the Supreme Court declined to address
25 given the debtor's failure to raise it earlier: i.e., that 11 U.S.C.
26 § 506(b) implicitly provides for the disallowance of unsecured claims

1 for post-petition attorneys' fees. Burlingame contends that this is
2 not a fair reading of 11 U.S.C. § 506(b).

3 **2. Analysis**

4 **A. Is It a Claim?**

5 In its argument, Burlingame assumes without discussion that its
6 post-petition attorneys' fees qualify as a "claim" against the
7 bankruptcy estate. The definition of "claim" is very broad and
8 includes "contingent" claims. See 11 U.S.C. § 101(5). Black's Law
9 Dictionary defines a "contingent liability" as "a liability that will
10 occur only if a specific event happens; a liability that depends on
11 the occurrence of a future and uncertain event." Black's Law
12 Dictionary 926 (7th ed. 1999), as cited in In re ML & Assocs., Inc.,
13 2003 WL 23742550, *2 (Bankr. N.D. Tex.).

14 Arguably, the definition of "contingent liability" cited above
15 may be read to require that the specific event triggering the
16 contingent claim be outside the claimant's control. Incurring post-
17 petition attorneys' fees is not outside a creditor's control. The
18 need to incur the fees may be triggered by conduct of the debtor or
19 some other third party but the creditor could choose to do nothing.
20 However, the Court has been unable to find any authority to support
21 this reading of "contingent liability."²

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24 ²But see In re Esagro Inc., 645 F.2d 794, 798 (9th Cir. 1981)
25 and In re THC Fin. Corp., 686 F.2d 799, 803 (9th Cir. 1982),
26 Bankruptcy Act cases holding that a contingent claim outside the
creditor's control is too uncertain to value and is thus not
"provable": i.e., in Bankruptcy Act terminology, allowable against
the bankruptcy estate.

1 Moreover, as discussed below, there is case authority decided
2 under the Bankruptcy Act, authorizing the inclusion of post-petition
3 attorneys' fees in a creditor's unsecured claim. The Bankruptcy Act,
4 as amended by the Chandler Act in 1938, also included contingent
5 claims within its definition of "claim."³ If this was error, one
6 would have expected Congress to clarify the meaning of "contingent"
7 when it enacted the Bankruptcy Code. Therefore, the Court holds that
8 Burlingame's post-petition attorneys' fees do qualify as a "claim"
9 under 11 U.S.C. § 101(5).

10 **B. Is Claim Subject to Disallowance?**

11 As Burlingame notes, 11 U.S.C. § 502(b) provides that, with
12 exceptions not relevant here, if an objection is made to a claim, the
13 claim shall be allowed, except to the extent that the claim falls
14 into one of nine categories. 11 U.S.C. § 502(b). The only category
15 that arguably supports the disallowance of an unsecured claim for
16 post-petition attorneys' fees is 11 U.S.C. § 502(b)(1): i.e., that
17 "such claim is unenforceable against property of the debtor and
18 property of the debtor, under any agreement or applicable law for a
19 reason other than because such claim is contingent or unmatured...."
20 11 U.S.C. § 502(b)(1).

21 The debtor contends that this category applies to post-petition
22 attorneys' fees because 11 U.S.C. § 506(b) renders the claim for
23 post-petition attorneys' fees unenforceable against the debtor and
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26 ³See Chandler Act, ch. 575, § 63(a)(8), 52 Stat. 840, 873
(1938) (adding contingent claims to the list of provable claims in §
63 of the Bankruptcy Act).

1 property of the debtor. Section 502(b)(1) refers to "applicable
2 law," not "applicable nonbankruptcy law." Thus, Section 506(b)
3 qualifies as "applicable law." Section 506(b) provides as follows:

4 (b) To the extent that an allowed secured claim
5 is secured by property, the value of which is
6 greater than the amount of such claim, there
7 shall be allowed to the holder of such claim,
8 interest on such claim, and reasonable fees,
9 costs or charges provided for under which such
10 claim arose.

11 Thus, according to the debtor, by providing that a secured claim
12 shall be allowed reasonable fees to the extent the claim is secured
13 by property, the Bankruptcy Code is implicitly saying that fees are
14 not available to an unsecured creditor.

15 The Court finds this reading of 11 U.S.C. §§ 502(b) and 506(b)
16 too strained to be persuasive. First, 11 U.S.C. § 506 is entitled
17 "Determination of Secured Status." A statute so entitled would not
18 be a logical place to provide for the disallowance of an element of
19 an unsecured claim. If Congress, in enacting the Bankruptcy Code,
20 had wanted to disallow claims for post-petition attorneys' fees, the
21 logical place for it to have done so was surely in 11 U.S.C. §
22 502(b).⁴ Moreover, 11 U.S.C. § 506(b) does not distinguish between
23 pre-petition and post-petition attorneys' fees. Thus, if 11 U.S.C.
24 § 506(b) is read as an additional ground for objecting to claims,
25 arguably, an unsecured creditor would be prohibited from including

26 ⁴See 11 U.S.C. § 502(b)(2)(disallowing claims for post-
petition interest).

1 its pre-petition attorneys' fees in its claim as well as its post-
2 petition fees.⁵

3 The Court has been unable to find any Court of Appeals decided
4 under the Bankruptcy Code, in either in this Circuit or any other,
5 that directly addresses this issue.⁶ The Ninth Circuit cases cited
6 by Burlingame are for the most part inapposite. They are either
7 nondischargeability cases, cases where the estate was requesting
8 fees, or cases where the Fobian distinction was at issue. However,
9 the cases establishing the estate's right to attorneys' fees as the
10 prevailing party in post-petition litigation--e.g., In re Eastview
11 Estates II, 713 F.2d 443, 451-52 (9th Cir. 1983)--provide an
12 additional equitable rationale supporting the Court's conclusion.
13 It would seem highly inequitable to permit the estate to recover fees
14 incurred in post-petition with a creditor while at the same time
15 denying the creditor the right even to include its post-petition fees
16 in its unsecured claim.

17 The Court has identified one Bankruptcy Act case decided by the
18 Second Circuit case that addresses this issue: i.e., United Merchants
19 & Manufacturers, Inc. v. Equitable Life Assurance, 674 F.2d 134, 137-
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21 ⁵But see Rake v. Wade, 508 U.S. 464, 468 (1993) and United
22 States v. Ron Pair Enterp., Inc., 489 U.S. 235, 240 (1989), which
23 appear to construe similar language in 11 U.S.C. § 506(b) regarding
interest to apply only to *post-petition* interest.

24 ⁶The Court views In re Welzel, 275 F.3d 1308 (11th Cir. 2001)
25 as inapposite. In that case, the creditor was fully secured.
26 However, some of the fees sought were deemed not reasonable as
required by 11 U.S.C. § 506(b). The Welzel court allowed the
reasonable fees as part of the creditor's secured claim and the
unreasonable fees as a general, unsecured claim. Id. at 1313-20.

1 38 (2d. Cir. 1982)(Bankruptcy Act). In United Merchants, the lower
2 court had allowed the unsecured creditor's contractual claims for
3 "collection costs" but only to the extent the litigation was
4 conducted outside the bankruptcy court. On appeal, the Second
5 Circuit removed this limitation. It rejected the argument that it
6 was unfair to give a creditor with a contractual attorneys' fee
7 clause a greater claim than unsecured creditors without a basis for
8 fees. Id. at 143-44. The only basis for distinguishing United
9 Merchants is that it was decided under the Bankruptcy Act, which did
10 not have an express provision comparable to 11 U.S.C. § 506(b). The
11 Court finds this distinction without significance.⁷

12 The strongest rationale for implying a prohibition on the
13 inclusion of post-petition attorneys' fees in a unsecured creditor's
14 pre-petition claim is that, unless the debtor is solvent, the
15 unsecured creditor's augmented claim will diminish the dividend to
16 other unsecured creditors. However, a similar effect flows from
17 allowing secured creditors to include their post-petition attorneys'
18 fees in their secured claims. While equality of distribution is one
19 of the basic tenets of bankruptcy law, another important policy in
20 bankruptcy is the preservation of nonbankruptcy legal rights except
21 to the extent necessary to facilitate the purpose of the bankruptcy
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23 ⁷The Bankruptcy Code had been enacted by the time this case
24 came up on appeal. The argument was made that, by enacting 11
25 U.S.C. § 506(b), Congress had intended to codify a rule applicable
26 also under the Bankruptcy Act, prohibiting the award of post-
petition fees to unsecured creditors. The United Merchants court
rejected this theory, concluding that 11 U.S.C. § 506(b) was only
intended to address the rights of secured creditors to post-
petition fees. Id. at 138.

1 proceeding. Absent a clear provision of the Bankruptcy Code
2 modifying a creditor's nonbankruptcy legal rights, the Court
3 concludes that those rights should be deemed to be left intact.

4 **CONCLUSION**

5 The Court concludes that Burlingame is entitled to include all
6 its reasonable post-petition fees in its unsecured claim against the
7 debtors. Burlingame is directed to file an amended motion for fees
8 within 60 days from the date of this decision, segregating by task
9 the work done on bankruptcy related issues and and providing the
10 additional detail describing the work done as previously provided for
11 the nonbankruptcy litigation. The debtors will be given 30 days from
12 the date of service of the amended motion to file an objection to the
13 fees as unreasonable in amount. Burlingame will be given 15 days
14 from the date of service of the opposition to reply and alert the
15 judge's law clerk when the matter is fully briefed.

16 **END OF DOCUMENT**

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